

RECEIVED

MAY 16 1991

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

Federal Communications Commission  
Office of the Secretary

In the Matter of

Amendment of the Commission's  
Policies on Preferences in  
Comparative Broadcast Hearings

Rm 7741  
MM Docket No. \_\_\_\_\_

ORIGINAL  
FILE

PETITION FOR RULEMAKING

Larry G. Fuss d/b/a Contemporary Communications, joined by Radix Broadcasting, Inc., Howard N. Binkow, and Dale A. Ganske, Petitioner, by counsel, respectfully requests that the Commission amend its broadcast comparative hearing policies to establish a preference benefitting petitioners who assume the risk and expense of locating an available channel for a new FM allotment and successfully pursuing that allotment through the Commission's rulemaking process and who become applicants for the new channel allotted.

As the Commission has noted, "[t]he FM Table is intended to allow the Commission to meet its obligation under Section 307(b) of the Communications Act to provide a 'fair, efficient and equitable distribution of radio service' to the various states and the communities within them." *Revision of FM Assignment Policies and Procedures (Second Report & Order)*, 90 F.C.C.2d 88, 89 (1982). The objectives of the Commission's allotment process are, therefore: "provision of some service of satisfactory signal strength to all of the country; provision of as many program choices to as many listeners as possible; and service of local origin to as many communities as possible." *Id.*

Petitioner submits that the Commission's objectives will more readily be met if petitioners are encouraged to seek allotments to small and/or rural underserved communities via a preference in the comparative hearing process.

Under the current process, a newly-allotted channel is opened to all qualified applicants under the "window" procedure described in Section 73.3573(f) of the Commission's Rules. If multiple applications are received and accepted for tender, they are designated for hearing and a permit is awarded pursuant to the comparative factors established in the *Policy Statement on Comparative Broadcast Hearings*. 1 F.C.C.2d 393 (1965). These comparative factors do not include any consideration of the time and effort which one of the applicants may have expended in order to have the channel allotted for which all are now applying.

Petitioner further submits that such a preference is consistent with the objectives underlying the *Policy Statement*. The two primary objectives underlying the comparison of competing applicants are: (1) best practicable service to the public, and (2) diversification of control of the media of mass communications. *Id.* at 394. Since the release of the 1965 *Policy Statement*, the Commission has, from time to time, added various considerations which it has concluded will further these objectives.<sup>1/</sup>

As the Commission also stated in the Docket 80-90 proceeding, the fundamental reason for creating new FM stations in Docket 80-90 was to enhance diversity and competition in broadcasting. *FM Broadcast Stations*, 94 F.C.C.2d 152 (1982). These goals are rooted in the belief that the public is best served by the broadcast industry when there are many outlets for expression and many competing voices, an objective consistent with the comparative broadcast evaluation.

---

<sup>1/</sup> For example, in the *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 F.C.C.2d 667, (1966), the Commission concluded that auxiliary power was a factor reasonably worthy of consideration among applicants in determining which offers the best practicable service. The Commission has also added enhancement credit for applicants under this criteria for minority and female applicants. See *West Michigan Broadcasting Company v. F.C.C.*, 735 F.2d 601 (D.C. Cir. 1984); *Horne Industries, Inc.* 94 F.C.C.2d 815 (Rev. Bd. 1983).

Petitioner respectfully requests that the Commission open a rulemaking proceeding for the purpose of adding the following consideration in comparative broadcast hearings: the award of a preference to an applicant for an FM channel which has been newly allotted pursuant to a petition for rulemaking to amend the Table of Allotments, 47 C.F.R. § 73.202, filed by the applicant. Petitioner submits that such a preference would further the Commission's objectives both under Section 307(b) and in comparative hearings.

*A Preference Would Encourage New Service  
in Underserved Areas*

Under the current policies, a potential applicant must expend a considerable amount of time and money in order to determine whether a channel could be allotted to a given community under the Commission's minimum spacing requirements. 47 C.F.R. § 73.207. Normally, a potential applicant<sup>2/</sup> retains a technical or engineering consultant to conduct a frequency search in order to identify a channel meeting the minimum distance separation requirements. Once a channel is identified, an applicant retains an attorney to prepare a petition for rulemaking to amend the Table of Allotments to include the new channel. The petition for rulemaking is usually supported by an exhibit from the applicant's technical or engineering consultant demonstrating compliance with the applicable provisions of Section 73.207 and Section 73.315(a) and (b). The petitioner also faces additional legal and engineering expenses if a counterproposal is filed. If the petitioner is successful in having the channel allotted, the petitioner must compete on the same basis as all other applicants for the new channel, receiving no consideration for its efforts to establish the new allotment.

This process creates a disincentive for the allotment of new FM channels in small or rural communities, unless the new channel is in or near a major

---

<sup>2/</sup> It can reasonably be assumed that the petitioner's purpose in seeking the allotment is to apply for the new channel. Indeed, such a representation is requisite for the grant of the petition. See, e.g., *FM Channel Assignments (Leesville, S.C.)*, 53 R.R.2d 341 (Mass Media Bureau 1983).

community sufficient to make the expense and risk worthwhile.<sup>3/</sup> A preference for the petitioner who seeks an allotment to serve a new community would lessen the disincentive to explore new allotments for small or rural communities.

The Commission has recently recognized that the awarding of a comparative preference would reward those who seek to develop new service and, therefore, encourage this activity. *In the Matter of Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, the Commission established a "Pioneer's Preference" for innovators proposing to introduce new services and technologies. F.C.C. 91-112 (rel. May 13, 1991). The Commission recognized in its proposal "that a preference procedure ensuring that the innovator had an opportunity to participate in a service that it first sought to develop would mitigate the adverse effect of the comparative hearing process on investment incentive." 5 F.C.C. Red. 2766 (1990). Those same concerns are no less evident here.

#### *A Preference Would Benefit AM Broadcasters*

The proposed incentive would also be beneficial to AM broadcasters, consistent with the Commission's efforts to revitalize AM broadcasting generally and to reward good licensee service in the public interest. *Review of the Technical Assignment Criteria for the AM Broadcast Service (NPRM)*, 5 F.C.C. Red. 4489 (1990); *Implementation of BC Docket No. 80-90 (Second Report & Order)*, 100 F.C.C.2d 638 (1985). When the Commission created the preference for AM day-timer licensees, it noted the technical and economic restraints under which these licensees were operating. 101 F.C.C.2d at 643. It must today be recognized that even full-time AM stations are suffering, with a difference only of degree.

---

<sup>3/</sup> Indeed, the majority of allotments to new rural or small towns are made as a by-product of an existing licensee who seeks a reallocation for the purpose of an upgrade in class, not because of petitioners who wish to serve these small or sparsely-populated areas.

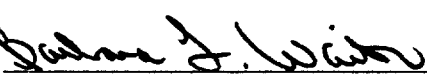
Thus, a small community with a "stand-alone" AM licensee suffers a peculiar disadvantage relating to the prospect for obtaining FM service. Such communities can rarely support two full-time stations, and the AM licensee, desirous as he may be of upgrading radio service to his community, is discouraged from seeking an FM allotment. Should he spend the time and effort to pursue the allotment, he must then face a comparative hearing in which his prospects are poor: he receives no preference for these efforts and faces the prospect of losing revenues from his existing facility to a new FM facility.

#### *Conclusion*

The Commission has noted that such preferences as those for minority applicants, day-time only stations, noncommercial applicants seeking to serve areas without noncommercial service and th like are more appropriately considered at the application stage, rather than the rulemaking (or allotment) stage. *Revision of FM Assignment Policies and Procedures (MO&O)*, 56 R.R.2d 448, 450 (1984). The Petitioner therefore requests, for the foregoing reasons, that the Commission open a rulemaking proceeding for the purpose of adding the following consideration in comparative broadcast hearings: the award of a preference to an applicant for an FM channel which has been newly allotted pursuant to a petition for rulemaking to amend the Table of Allotments, 47 C.F.R. § 73.202, filed by the applicant.

Respectfully submitted,

LARRY G. FUSS, d/b/a  
CONTEMPORARY COMMUNICATIONS

By   
Barbara L. Waite  
Venable, Baetjer, Howard & Civiletti  
1201 New York Avenue, N.W., Suite 1000  
Washington, D.C. 20005  
(202) 962-4811

His Attorney

May 16, 1991